91-1543

(1)

Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

LUCY M. LONG, PETITIONER
vs.
CHIEF ROBERT SMYTHE,
MAYOR LOUIS SAURAULLO
and BOROUGH OF DARBY

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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98

QUESTIONS PRESENTED

1. Could a jury determine that the Borough of Darby, its mayor and police chief were deliberately indifferent to the medical needs of Octavis M. Long, a detainee, when it was their custom and policy to knowingly delay cardiopulmonary and other life support emergency first aid to detainees found hanging in cells by custodial employees responsible for the welfare of the incarcerated persons?

2. Did the lower court err in refusing to permit a jury to determine if the Borough of Darby, its mayor and police chief knew or should have known of decedent's particular vulnerability to suicide, based in part upon evidence that decedent fit a nationally recognized profile?

TABLE OF CONTENTS

Opinions below.....2

Jurisdiction.....2

Constitutional and statutory provisions involved.....2

Statement of the case.....3

Reasons for granting the petition.....11

I.

THE BOROUGH OF DARBY, ITS MAYOR AND POLICE CHIEF WERE DELIBERATELY INDIFFERENT TO THE MEDICAL NEEDS OF OCTAVIS M. LONG, A JUVENILE DETAINEE, THROUGH THEIR CUSTOM AND POLICY OF KNOWINGLY DELAYING CARDIOPULMONARY AND OTHER LIFE SUPPORT EMERGENCY FIRST AID TO DETAINEES LIKE LONG FOUND HANGING IN CELLS.....11

A. The Decision Below is Contrary to The Decision of the United States Court of Appeals for The Third Circuit in Simmons v. The City of Philadelphia, 90-1118, Slip op. F.2d (3d Cir. October 18, 1991).....22

B. As The Number of Intoxicated First Time Offenders Incarcerated in Police Department Jails Increase and As The Number of Conflicting Decisions Within The Lower Courts Increase, It Is Necessary For This Court To Exercise Its General Supervisory Authority To Maintain Uniformity...30

II.

THE LOWER COURT ERRED IN REFUSING TO PERMIT A JURY TO DETERMINE IF THE BOROUGH OF DARBY, ITS MAYOR AND POLICE CHIEF KNEW OR SHOULD HAVE KNOWN OF OCTAVIS M. LONG'S PARTICULAR VULNERABILITY TO SUICIDE BASED IN PART UPON EVIDENCE THAT LONG FIT A NATIONALLY RECOGNIZED PROFILE.....34

A. The Refusal Of The Court Below To Recognize Evidence That Octavis M. Long Fit a Nationally Recognized Profile Encourages The Deliberate Indifference Which Civil Rights Laws Are Designed to Protect Against....34

Conclusion.....47

Appendix A (Opinion of The United States Court of Appeals Affirming The Judgement of The District Court).....48

Appendix B (Opinion of The District Court Granting Summary Judgment and Entering Judgment).....63

Appendix C (Denial of Petition for Re-hearing by The United States Court of Appeals).....88

Appendix D (42 U.S.C. Section 1983; Amendment XIV to The United States Constitution).....90

TABLE OF AUTHORITIES

Supreme Court Cases

City of Canton, Ohio v. Harris, ___ U.S.___, 109 S.Ct. 1197,

103 L.Ed.2d 412 (1989).....12,13,14, 22,26,34

Hudson v. Palmer, 468 U.S. 517 (1984).....15

Monell v. Dept. of Social Services of The City of New York, 436 U.S. 658 (1978).....12,14

Pembaur v. City of Cincinnati, 475 U.S. 469, 106 S.Ct. 1292 (1986).....15

Federal Court Cases

Buffington v. Baltimore County, M.D., 913 F.2d 113 (4th Cir. 1990).....31

Cabrales v. County of Los Angeles, 864 F.2d 1454 (9th Cir. (1988).....31

Colburn v. Upper Darby Township, 838 F.2d 663 (3d Cir. 1988) (Colburn I).....15,16, 17,31

Colburn v. Upper Darby Township, ___ F.2d ___ (3rd Cir. 1991) (Colburn II).....31

Freedman v. City of Allentown, 853 F.2d 1111 (3d Cir. 1988).....17,31,35

Lewis v. Parrish of Terrebone, 894 F.2d 142 (5th Cir. 1990).....31

Simons v. City of Philadelphia, 728 F.Supp. 352 (E.D. Penna. 1990).....44

Simmons v. City of Philadelphia, No. 90-1118, slip op., ___ F.2d ___ (3d Cir. October 18, 1991).....15,22, 24,26

Stoneking v. Bradford Area School District, 882 F.2d 720 (3d Cir. 1989).....12,27, 29,30

Williams v. Borough of West Chester, 891 F.2d 458 (3d Cir. 1989).....17,31,35

STATUTES

28 U.S.C. Section 1254 (1).....2

42 U.S.C. Section 1981.....10

42 U.S.C. Section 1983.....33

Miscellaneous

Fed. R. Evid. 407.....46

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Stephen R. Bolden, Esquire, Daniel B. Michie, Jr., Esquire, and Debra Schwaderer Dunne, Esquire, on behalf of Lucy M. Long, the Administratrix of the Estate of Octavis M. Long, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

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[1] The other parties to this case are respondents, Mayor Louis Sauraullo and Borough of Darby.

OPINIONS BELOW

The memorandum opinion of the United States Court of Appeals affirming the judgment of the District Court is unreported. (App. A). The memorandum opinion of the District Court granting summary judgment and entering judgment is unreported. (App. B).

JURISDICTION

The judgment of the Court of Appeals was entered on October 30, 1991. A timely petition for re-hearing was denied on December 2, 1991. (App. C). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional provisions and statutes which are set forth in Appendix D:

The Fourteenth Amendment to the United States Constitution and 42 U.S.C. Section 1983.

STATEMENT OF THE CASE

In the early morning hours of September 8, 1988, Octavis M. Long, a seventeen year old juvenile resident of Darby Borough was arrested by Darby Borough police and charged with disorderly conduct, criminal trespass and public drunkeness. (See Appendix of Appellant's Appeal from Orders of the United States District Court for the Eastern District of Pennsylvania [hereinafter referred to as App. of Appellant] at 149-150).

At approximately 1:00 A.M., Long was taken to and incarcerated in Cell No. 3 of the Darby Borough Police Department jail. Cell No. 3, the "juvenile cell", is physically separated from two adult cells by a door with a small window opening. In

addition, all three cells are separated from the squad room by another door. App. of Appellant at 156, 158-159, 185.

At approximately 2:45 A.M., one hour and 45 minutes after Long was placed in Cell No. 3, Officer Kraemer entered the cell area and went to Long's cell because he could hear Long crying from the squad room. Officer Kraemer testified that he stayed with Long for five minutes until 2:50 A.M. to calm him. He then left the cell area and exited the building. App. of Appellant at 198-202.

At 2:49 A.M., the turnkey found Long hanging in a seated position from the cell door with a pair of pants knotted around his neck and around the cell door. The turnkey did not try to enter the cell and did not try to cut down Long but

instead went back to the squad room to radio for help. App. of Appellant at 185, 190-195.

The turnkey's decision not to enter the cell and render aid to the hanging Long was in keeping with the policy or custom of the Darby Borough Police Department which forbids a turnkey from opening a locked cell door unless there is a police officer instructing him to do so. App. of Appellant at 188.

Officers Kraemer and Collins received a radio message asking for help and returned to the police station. Officer Kraemer saw Long in a seated position with his back against the bars. He recalled that something was tied around Long's neck and something was tied around the bars. Officer Kraemer instructed the turnkey to open the cell door. App. of Appellant at 203-206.

The turnkey testified that approximately two minutes elapsed from the time he first saw Long hanging until the time Officers Kraemer and Collins arrived at the police station. App. of Appellant at 196.

A paramedic from the Darby Borough Fire Company arrived at the police station at 3:08 A.M. and the Fitzgerald Mercy Hospital paramedics arrived between 3:05 A.M. and 3:10 A.M. Long was transported to the Fitzgerald Mercy Hospital at 3:20 A.M. where he was pronounced dead. App. of Appellant at 212, 214-216.

A post mortem performed by the medical examiner of Delaware County determined that the cause of death was hanging and that Long had a blood alcohol level of .11% at the time of his death. App. of Appellant at 217-224.

There were 13 suicide attempts by arrestees held in the Darby Borough Police Department jail in the five years immediately preceding the death of Long. Almost all of these suicide attempts occurred in the late evening or early morning hours when the turnkey was alone at the police station. Almost all suicide attempts involved an arrestee who was under the influence of drugs or alcohol. All incidents involved an attempt by the arrestee to hang himself with an article of clothing. App. of Appellant at 225-245.

One of the arresting officers testified that he knew that an intoxicated individual like Long is at greater risk to harm himself when incarcerated than some other arrested individual. App. of Appellant at 184.

The Darby Borough police chief stated that he had knowledge of a successful suicide by an arrestee who hung himself in 1983 with a pair of trousers. He also knew of several suicide attempts at the Darby Borough police station prior to the death of Long. In fact, he was aware of an attempted suicide that occurred just three days prior to Long's suicide. App. of Appellant at 165-170.

On the date of Long's suicide, the Darby Borough Police Department did not have a policy for training its turnkeys on suicide prevention. Nor did it have a written policy manual addressing incarceration or monitoring of detainees in its jail. App. of Appellant at 161, 163-164, 173-175.

Petitioner's expert, Cyril Wecht, M.D., a forensic pathologist and former coroner of Allegheny County, Pittsburgh, Pennsylvania, offered the following opinions concerning Long's death:

1. Long was alive when discovered by the turnkey;

2. The cerebral hypoxia/anoxia brought on by the hanging process was reversible if prompt resuscitative efforts had been administered to Long when he was discovered by the turnkey at 2:59 A.M.; and

3. In all likelihood, Long would have survived if resuscitative measures were promptly instituted and he would have had only minimal neurologic deficits. App. of Appellant at 246-250.

The District Court granted summary judgment as to all Defendants.[2] App. B. Plaintiff-Appellant appealed as to the judgments granted in favor of the Borough of Darby, its mayor and the police chief.

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[2] The court stated that summary judgment on the suicide prevention claims must be entered for the Borough of Darby; the Mayor, Louis Sauraullo, in his official capacity; and the Chief of Police, Robert Smythe, in his official capacity since Plaintiff failed to show that the Borough's policies might be unconstitutional.

The court also entered summary judgment for the Defendant police officers and for the chief of police in his individual capacity on the claims brought by Plaintiff under the Fourth and Fifth Amendments and under 42 U.S.C. Section 1981.

The Court of Appeals affirmed the judgment of the District Court. App. A. A petition for re-hearing en banc was denied.

Certiorari is sought to review recurrent and important questions involving the conflicting decisions throughout the jurisdictions and in particular, the conflicting decisions in the Third Circuit concerning jail suicide cases; an issue which should be resolved by this Court's exercise of its general supervisory authority.

REASONS FOR GRANTING THE PETITION

I.

THE BOROUGH OF DARBY, ITS MAYOR AND POLICE CHIEF WERE DELIBERATELY INDIFFERENT TO THE MEDICAL NEEDS OF OCTAVIS M. LONG, A JUVENILE DETAINEE, THROUGH THEIR CUSTOM AND POLICY OF KNOWINGLY DELAYING CARDIO-PULMONARY AND OTHER LIFE SUPPORT EMERGENCY FIRST AID TO DETAINEES LIKE LONG FOUND HANGING IN CELLS

In 1978, this Court held that although governments cannot be held liable under 42 U.S.C. Section 1983 on a theory of respondeat superior, they may be directly subject to Section 1983 liability as a result of an official policy or custom. Monell v. Dept. of Social Services of the City of New York, 436 U.S. 658 (1978).

Later, this Court recognized that governmental officials may not escape liability for their policies which are maintained in deliberate indifference to actions taken by their subordi-nates. City of Canton, Ohio v.Harris, ___ U.S.___ , 109 S.Ct. 1197, 1205, 103 L.Ed.2d 412 (1989); Stoneking v. Bradford Area School Dist., 882 F.2d 720, 725 (3d Cir. 1989).

In City of Canton, Ohio, this Court announced that inadequacy of police training may serve as a basis for Section 1983 liability where the failure to train

amounts to deliberate indifference to the rights of persons with whom the police come in contact. City of Canton, Ohio v. Harris, ___ U.S. ___, 109 S.Ct. at 1204. In fact, this Court emphasized that "it may happen that in light of the duties assigned to specific officers or employers, the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." City of Canton, Ohio v. Harris, 109 S.Ct. at 1205.

This Court partly articulated, in City of Canton, Ohio, the elements for establishing the "deliberate indifference" standard, defining the standard in the negative and holding that a municipality's deliberately indifferent failure to train

is not established by (1) presenting evidence of the shortcomings of an individual; (2) proving that an otherwise sound training program occasionally was negligently administered; or (3) showing, without more, that better training would have enabled an officer to avoid the injury-causing conduct. Id. at 1206.

Further merging the deliberate indifference standard with Monell's municipal policy or custom requirement, this Court held that municipal liability under Section 1983 attaches where a deliberate choice to follow a course of action is made from among various alternatives by city policy makers. Id. at 1205. Moreover, even a single decision under these circumstances will give rise to municipal liability when a particular course of action is directed by those who

establish governmental policy. See, Pembaur v. City of Cincinnati, 475 U.S. 469, 481, 106 S.Ct. 1292, 1298 (1986).

Recently, the Third Circuit Court of Appeals held that a municipality's 42 U.S.C. Section 1983 liability is conditioned on the liability of a municipal actor who is a high level policy maker, as opposed to a low lever employee. See, Simmons v. City of Philadelphia, No. 90-1118, slip op. ___ F.2d ___ (3d Cir. October 18, 1991).

In Hudson v. Palmer, 468 U.S. 517, 526-7 (1984), this Court stated that prison administrators "are under an obligation to take reasonable measures to guarantee the safety of the inmates themselves." In Colburn v. Upper Darby Township, 838 F.2d 663, 668 (3d Cir. 1988), cert. denied, 109 S.Ct. 1338 (1989), the third circuit announced that the same duty was owed to

detainees and that the duty applied "when the acts causing the injury are those of the prisoner herself." The third circuit explained that:

> [C]ustodial officials cannot be placed in the position of guaranteeing that inmates will not commit suicide. On the other hand, if such officials know or should know of the particular vulnerability to suicide of an inmate, then the Fourteenth Amendment imposes on them an obligation not to act with reckless indifference to that vulnerability.

Id. at 669.

In Colburn, the third circuit declined to define "gross negligence" or distinguish it from "reckless disregard" or "reckless indifference" in the civil rights context. Id. at 670. Nor has the third circuit distinguished the term "deliberate indifference." Consequently, an under-

standing of "reckless indifference" or "deliberate indifference" must be derived from fact-specific holdings in cases involving jail suicides.

It is for that reason that the trial court compared the case below with three jail suicide cases decided in the third circuit from 1988 through 1989, Colburn v. Upper Darby Township, 838 F.2d 663 (3d Cir. 1988); Freedman v. City of Allentown, 853 F.2d 1111 (3d Cir. 1988); Williams v. Borough of West Chester, 891 F.2d 458 (3d Cir. 1989), in its holding that there was no evidence that Long had a suicidal propensity and that "because Long did not demonstrate a suicidal propensity, the policy of having turnkeys radio for help did not amount to deliberate indifference." Appendix B at 8-9.

We believe that Judge Giles erred in the logic and application of Colburn, Freedman and specifically Williams, in his memorandum opinion. Specifically, there was sufficient evidence on the record that Long fit the category of those individuals with a suicidal propensity. Furthermore, a policy prohibiting a turnkey from rendering immediate first-aid or cardiopulmonary rescusitation to detainees who are in the process of dying, given the knowledge of prior suicide attempts and one successful suicide at the Darby Borough police station, was evidence of deliberate indifference.

In particular, the uncontroverted evidence before the lower court established that:

1. in the five year period prior to Long's death, one successful suicide was carried out in the same manner as that employed by Long. App. of Appellant at 165-166;

2. in the five year period prior to Long's death, thirteen detainees had attempted suicide by hanging themselves with an article of clothing. App. of Appellant at 225-245;

3. a suicide attempt by hanging occurred only three days prior to Long's suicide. App. of Appellant at 225-245;

4. most of the suicide attempts occurred late at night and were carried out by detainees who were under the influence of alcohol or drugs. App. of Appellant at 225-245;

5. the police chief was aware of all thirteen suicide attempts. App. of Appellant at 168-170;

6. Darby Borough ran a jail in which it was compensated at the rate of $50.00 per prisoner for each detainee that it accepted for detention from five surrounding jurisdictions. App. of Appellant at 156-157;

7. it is the custom and policy of the Darby Borough Police Department, instituted by Police Chief Smythe, to forbid the turnkey from entering a cell to render first-aid and cardiopulmonary rescusitative measures to a detainee who is hanging himself. App. of Appellant at 188, 208, 211;

8. a turnkey confronted with a detainee hanging himself must radio to uniformed officers patrolling the streets for help. App. of Appellant at 208;

9. it took approximately two minutes for police officers to return to the police station after Long was found hanging from his cell door by the turnkey. App. of Appellant at 196; and

10. Petitioner's expert, Dr. Cyril Wecht, a forensic pathologist and former coroner of Allegheny County, Pittsburgh, Pennsylvania, stated that immediate rescusitative measures would have saved the decedent's life and left him with only minimal neurological deficits. App. of Appellant at 246-250.

We believe reasonable jurors could conclude "...that in light of the duties assigned to specific officers or employees, the need for more or different training [was] so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policy-makers of [Darby Borough] can reasonably be

said to have been deliberately indifferent to the need." City of Canton, Ohio v. Harris, 109 S.Ct. at 1205.

Moreover, the policy of preventing turnkeys from rendering immediate first-aid was implemented by the police chief when he had actual knowledge of numerous suicide attempts by hanging at the Darby Borough Police Department jail. Thus, we believe that reasonable jurors could conclude that this constituted a deliberate choice to follow a course of action from among various alternatives by the Borough's chief policymaker thereby making the chief of police and the Borough liable for violating Long's civil rights. See, City of Canton, Ohio v. Harris, 109 S.Ct. at 1205.

A. The Decision Below is Contrary to the Decision of the United States Court of Appeals for The Third Circuit in Simmons v.The City of Philadelphia, 90-1118, slip op. F.2d (3d Cir. October 18, 1991)

The Simmons case is an example of where the third circuit decided that the record was not lacking evidence on which the jury could find that the City was deliberately indifferent in failing to take steps to meet the serious medical needs of intoxicated and suicidal detainees. The Simmons court held that the record contained sufficient evidence to support a 42 U.S.C. Section 1983 verdict against the City. The third circuit in Simmons explained that:

> [i]n order to establish the City's liability under her theory that Simmons's rights were violated as a result of a municipal policy or custom of deliberate indifference to the serious medical needs of intoxicated and potentially suicidal detainees, Plaintiff must have shown that the officials determined by the District Court to be the responsible policymakers were aware of the number of

> suicides in City lockups and of the alternatives for preventing them, but either deliberately chose not to pursue these alternatives or acquiesced in a longstanding policy or custom of inaction in disregard. As a predicate to establishing her concomitant theory that the City violated Simmons's rights by means of a deliberately indifferent failure to train, Plaintiff must similarly have shown that such policymakers, likewise knowing of the number of suicides in City lockups, either deliberately chose not to provide officers with training in suicide prevention or acquiesced in a longstanding practice or custom of providing no training in this area.

Simmons, at 43-44, ___ F.2d ___ (3d Cir. October 18, 1991).

The summary judgment record read in light of Simmons, reveals compelling facts from which reasonable jurors could conclude

that the Borough of Darby, its mayor and police chief acted with deliberate indifference to the serious medical needs of Octavis M. Long.

Evaluating the facts under the legal principles set forth in Simmons, reasonable jurors could find that:

a) Police Chief Smythe had final policy making authority for the actual operation of the jail; training of the turnkey; and the practice to be observed by the turnkey in that job.

b) Police Chief Smythe was responsible for the practice of prohibiting turnkeys from entering the cell of a prisoner in the process of committing suicide to render immediate first-aid or other rescusitative measures.

c) Police Chief Smythe admitted awareness of the fact, that prior to Long's death, several intoxicated

detainees attempted to commit suicide by hanging themselves with articles of clothing in the early morning hours when the turnkey was left alone.

d) Police Chief Smythe had no program for training the turnkey in suicide prevention or detection.

Moreover, reasonable jurors could conclude that Police Chief Smythe knew or should have known that "...in light of the duties assigned to specific officers or employees, the need for more or different training [was] so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policy makers of the [Borough] can reasonably be said to have been deliberately indifferent to the need." See Id. at 33-36 and nn. 13-14 (citing City of Canton, Ohio v. Harris, 109 S.Ct. 1197 (1989)).

Furthermore, reasonable jurors could find that Police Chief Smythe was the "municipal actor" with "final policy making authority in the areas in question"; and that given his knowledge of prior frequent suicide attempts by intoxicated detainees and the lack of training of the turnkey, he had the requisite "scienter-like" state of mind required to impose Section 1983 liability on the Defendant Borough. See Id.

Finally, The panel decision of the third circuit states that:

> there are many contexts in which a trier of fact might find deliberate indifference from a policy that failed to provide an attendant who could enter a cell in relative safety as soon as a suicide attempt is discovered to give first aid. Nevertheless, we think a finding of deliberate indifference would not be permissible in this context. First, it must be acknowledged

> that entering a cell without the strength and training necessary to secure a detainee in the event the suicide attempt is a ruse is dangerous not only to the person entering the cell but also to the security of the prison. Given that hazard, we do not think the restriction on untrained turnkeys entering cells can itself be a predicate for a finding of reckless indifference to the lives of detainees.

App. A at 6.

The panel disregards the only expert testimony on the record on this issue from Petitioner's expert, namely that the training of the police and primarily its turnkeys was improper because they were trained not to enter cells alone, under any circumstances and had no training of the kind generally accepted by police agencies across the country, such as that described in Standard 5006 of the American Correct-

ional Association's Manual for local adult detention facilities (App. of Appellant's at 330-332); substitutes its judgment of a legitimate governmental purpose; and ignores the requirement in Simmons that the Defendant produce evidence of such purpose, based on excessive cost, or lack of effectiveness, justifying its refusal to implement measures designed to attend to the serious medical needs of detainees in the process of committing suicide.[3]

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[3] In Simmons, the Court discusses the evidence a municipal defendant must put forward to justify a cost/benefit, balancing type judgment call, which denies safety measures for serious medical needs of detainees. See, Simmons v. City of Philadelphia, at 53-56, 63-67.

Defendant below, produced no evidence to justify its decision not to train the turnkey in suicide prevention measures or have an additional back-up employee in the jail during late night and early morning hours when the turnkey was usually alone and suicide attempts were predictable.

Given the frequent prior suicide attempts at its jail and the practical problems which could foreseeably prevent a swift response from officers summoned by

B. **As The Number of Intoxicated First Time Offenders Incarcerated in Police Department Jails Increase and as The Number of Conflicting Decisions Within The Lower Courts Increase, It Is Necessary For This Court to Exercise Its General Supervisory Authority to Maintain Uniformity.**

The current emphasis on strict enforcement of drug laws and laws concerning the operation of motor vehicles while intoxicated, will increase the number of individuals incarcerated in police department jails and may very likely increase the number of tragedies giving rise to jail suicide claims. In fact, suicides by detainees have spawned decisions by courts in the third, fourth, fifth and ninth circuits. See, Simmons v. City of Philadelphia, No. 90-1118, slip op.

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the turnkey (i.e. vehicle problems; other police emergencies; etc.) **Defendants, as the moving parties,** failed to present evidence from which a fact finder could conclude that the practice in question was justifiable.

___ F.2d ___ (3d Cir. October 18, 1991); Colburn v. Upper Darby Township, ___ F.2d __ (3d Cir. 1991) (Colburn II); Williams v. Borough of West Chester, 891 F.2d 458 (3d Cir. 1989); Buffington v. Baltimore County, M.D., 913 F.2d 113 (4th Cir. 1990); Lewis v. Parish of Terrebone, 894 F.2d 142 (5th Cir. 1990); Freedman v. City of Allentown, 853 F.2d 1111 (3d Cir. 1988); Colburn v. Upper Darby Township, 838 F.2d 664 (3d Cir. 1988) (Colburn I); Cabrales v. County of Los Angeles, 864 F.2d 1454 (9th Cir. 1988).

Consideration by this Court is necessary to secure and maintain uniformity of decisions to avoid any confusion which may already exist. For example, borough and township solicitors who advise municipalities on the proper procedures for operating jails and members of the bar who are to advise clients and make decisions on

whether to commit resources, time and money to the expensive undertaking of prosecuting jail suicide cases, will find the difference in the result in the decision below and the decision in Simmons confusing and inexplicable.

For instance, on November 6, 1991, a lead article appeared in The Legal Intelligencer, the daily legal newspaper in Philadelphia County, Pennsylvania, titled: "Jail Suicides: Recent Rulings Confuse Burden-Of-Proof Issue." This article discussed in detail the recent panel decisions in Simmons v. City of Philadelphia, Colburn v. Upper Darby Township, (Colburn II) and the panel decision in this case.

Although the panel decision in this case is unpublished, it can be anticipated that the article in The Legal Intelligencer will cause many attorneys confronted with

similar issues to secure copies of the unpublished opinion in Long and the opinion in Simmons to determine the state of the law.

The time is ripe for this Court to decide the important question of federal law that arises in 42 U.S.C. Section 1983 jail suicide cases, namely what elements are necessary to establish the "deliberate indifference" standard. A question which was partially articulated by this Court in 1989 in City of Canton, Ohio, (where this Court defined the standard in the negative holding that a municipality's deliberate indifferent failure to train is not established by (1) presenting evidence of the shortcomings of an individual; (2) proving that an otherwise sound training program occasionally was negligently administered; or (3) showing, without more, that better training would have enabled an

officer to avoid the injury-causing conduct, City of Canton, Ohio, 109 S.Ct. 1205), and a question which should be finally settled by this Court.

II.

THE LOWER COURT ERRED IN REFUSING TO PERMIT A JURY TO DETERMINE IF THE BOROUGH OF DARBY, ITS MAYOR AND POLICE CHIEF KNEW OR SHOULD HAVE KNOWN OF OCTAVIS M. LONG'S PARTICULAR VULNERABILITY TO SUICIDE BASED IN PART UPON EVIDENCE THAT LONG FIT A NATIONALLY RECOGNIZED PROFILE

A. The Refusal of the Court Below To Recognize Evidence That Octavis M. Long Fit a Nationally Recognized Profile Encourages The Deliberate Indifference Which Civil Rights Laws Are Designed to Protect Against.

In Colburn, Freedman and Williams, the court addressed the question of whether the Defendants know or should know of the particular vulnerabil-ity to suicide of an inmate. The court in Freedman, and Williams, stated that the answer to this question involved a fact intensive scrutiny of the record, inevitably involving the

court in the process of "line-drawing." Williams v. Borough of West Chester, 891 F.2d at 465; See, Freedman v. City of Allentown, 853 F.2d 1111 (3d Cir. 1988).

Of particular importance is that none of these cases limited or affirmatively set the character of evidence which is needed to demonstrate the vulnerability to suicide and the knowledge of that vulnerability.

The trial judge concluded there was no evidence that decedent had a suicidal propensity. He discounted the value of suicide profile information relied upon nationally by police custodial authorities, ignored the fact that decedent was an intoxicated juvenile incar cer-ated alone in an adult facility and crying out and ignored the fact that Long fit the statistical profile of a person most at risk to commit suicide.

To accept the decision of the lower court, is to disregard the significance of a vast body of suicide-profile information routinely relied upon around the country for many years prior to Long's incarceration by officials in charge of jails which pinpoints the profile of a detainee most at risk to commit suicide.

In 1981, Petitioner's expert, Lindsay Hayes, performed a study for the United States Department of Justice on jail suicides which determined that the suicide rate for juveniles in adult jails is approximately eight times greater than for juveniles in the community; juveniles detained in adult jails are separated from adult inmates by sight and sound; the isolation produced by this process, increases the risk of suicide by juveniles in adult jails; and two out of three

suicides in jails across the country are committed by those in isolation. App. of Appellant at 354-357.

Mr. Hayes developed a widely recognized "suicide profile" for the Justice Department which is used and relied upon by custodial authorities throughout the country. In Mr. Hayes' opinion, Long fit some of the important characteristics of a detainee most at risk to commit suicide, including the youthful age of the offender; the non-serious nature of the offense; being under the influence of drugs or alcohol; being in isolation; and carrying out the suicide soon after entering jail. App. of Appellant at 267-269, 358-360.

According to Mr. Hayes, intake screening forms were used by police department jails throughout the country for many years prior to Long's incarceration

and are included in national jail standards as a requirement for the operation of jail facilities; a suicidal inmate in an adult jail is considered a special inmate; a juvenile detainee in an adult jail is considered to be a special inmate; someone who is suicidal may require constant eyeball supervision; and the care by Darby Borough was grossly inadequate based upon its lack of suicide prevention measures, lack of training, lack of intake screening and lack of procedures for providing a consistent policy. App. of Appellant at 267-269, 364-366, 368-370.

Petitioner's other expert, Patrick Anderson, testified that:

a) placing an intoxicated juvenile in isolation in an adult jail violated virtually every standard of conduct for law enforcement agencies around the country;

b) in accordance with generally accepted practices in the field, Long should have been taken home, taken to an appropriate juvenile facility, taken to the detoxification unit of a hospital or, if those options are unavailable, placed under constant eyeball supervision by properly trained personnel;

c) the training of the police and primarily its turnkeys was improper because they were trained not to enter cells alone, under any circumstances, and had no training of the kind generally accepted by police agencies across the county, such as that described in Standard 5006 of the American Correctional Association's manual for local adult detention facilities. App. of Appellant at 321-324, 330-332.

Mr. Anderson stated that incarcerating juveniles in adult facilities, out of view of correctional officers, is simply unheard of and a practice which went out a long time ago. He was not aware of any adult facility housing juveniles that did not have a policy of constant eyeball supervision when a juvenile is detained in an adult jail; and the matter of suicide prevention in police jails resides in the overall constellation of responsibilities of the police chief. App. of Appellant at 339, 344.

The panel decision states that there was "...no evidence that any custodian, police officer, or policy setter in the Borough was aware of the degree of suicide risk for juveniles detained in adult facilities testified to by plaintiff's expert." App. A at 8. This statement appears to disregard the evidence

of the police chief's knowledge of prior suicide attempts; his knowledge of a prior successful suicide; the written warning sent to his predecessor by the State Attorney General's office pointing out the illegality in holding juveniles in an adult facility; the wide-spread availability of national standards; the existence of specific state statutory prohibitions on housing juveniles in an adult facility; and the state regulations and federal guidelines.

Ignoring the significance of such evidence simply encourages an attitude in custodial authorities which reflects the precise type of deliberate indifference that the civil rights laws are designed to protect against.

If this Court were to lay down a rule excluding imputed knowledge based upon widely recognized and accepted information,

it would encourage an attitude on the part of custodial authorities which clearly makes it more profitable to bury their heads in the sand.

In this case, the Respondents did precisely that. They had no training program, no suicide screening program, no written policy or procedural manuals, no training for turnkeys, ignored written directives from the State Attorney General pointing out the risk of suicide inherent in housing juveniles in an adult facility and even ignored state statutory law which made that practice illegal.

The message which all of this conveys based upon the lower court's opinion, is that this type of attitude is permissible.

If a line is to be drawn in this case, we respectfully submit that the imputed knowledge which the Respondents

should have possessed places the case on that side of the line where a jury could find them liable.

It should be noted that at least one other federal district court in Pennsylvania, which has applied the concepts of Colburn, Freedman and Williams has obviously not drawn the same message as did the lower court in this case.

The court in Simmons found that published standards showing the suicide profile of those individuals most at risk to commit suicide in a jailhouse lock-up was sufficient to permit a jury to find the Defendant liable for civil rights violations under a deliberate indifference standard. The court stated:

> Plaintiff's experts, Joseph Rowen and Dr.Edward Guy both testified that Simmons fit the psychological profile of an individual who was at high risk to commit suicide, i.e., the Plaintiff was intoxicated, young, a high school

> graduate, employed, agitated, crying, unresponsive and exhibiting mood swings. Dr. Guy further testified that 99 percent of all suicides take place in isolated cells and that the periodic checks, as allegedly made by Officer Panati, are nowhere near sufficient.
>
> * * * *
>
> Both experts testified that intoxicated detainees, especially those exhibiting the symptoms of Simmons, should be observed at all times. Mr. Rowan based his testimony on CALEA standard 72.5.4 which requires intoxicated arrestees to be under observation at all times. Both experts further testified that even a layman with minimal training could observe intoxicated arrestees and recognize suicidal symptoms.

Simmons v. City of Philadelphia, 728 F.Supp. at 355, 356.

The language of the Court in Simmons summarizing the evidence in that case is very similar to the evidence which was disregarded by the lower court in this case.

Based upon the panel decision in Simmons reasonable jurors in this case could conclude:

a) that Police Chief Smythe, deliberately reversed the policy of his predecessor, Superintendent Emery, who, after being advised by a representative of the State Attorney General's office of the illegality of holding juveniles in an adult facility, had informed her in writing that Darby Borough did not hold juveniles in its jail. App. of Appellant at 262-263.

b) under these circumstances, a jury could find that Police Chief Smythe had "scienter-like" knowledge of the illegality of the practice he was

responsible for implementing and routinely carrying out; the way in which that policy could cause suicides; and additionally, at a minimum, that he also knew or should have known, that it was contrary to national standards and federal regulations to house juveniles in adult facilities, without placing them under constant eyeball observation; and that Smythe was aware or should have been aware of non-costly procedures that could have been utilized to prevent the constitutional injury in question.[4]

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[4] Reasonable jurors could conclude that Smythe's post-suicide activity in almost immediately handing out a policy manual; installation of video equipment; and the wide spread availability of standards calling for numerous alternative measures, demonstrates both the feasibility of those measures and the fact that he knew or should have known of these widely recommended alternatives prior to the tragedy. (See, Fed. R. Evid. 407.)

We respectfully submit that it is contradictory to suggest that Respondents can be held liable for conduct which is deliberately indifferent on the one hand and yet escape liability by ignoring fundamental standards throughout the country relating to training, screening and recognizing potential suicide candidates.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

FELL & SPALDING

BY: _____

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Attorneys for Petitioner

DATED: 3/17/92

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 90-1389 and 90-1408

LUCY M. LONG, Individually and as
Administratrix of the Estate of
OCTAVIS M. LONG, her son, deceased,

Appellant
vs.

OFFICER THOMAS COLLINS,
OFFICER DARRELL GUY, OFFICER
CORY KRAEMER, OFFICER RICHARD
GALLI, CHIEF ROBERT SMYTHE,
DARBY BOROUGH POLICE DEPARTMENT
AND MAYOR LOUIS SAURAULLO, and
THE BOROUGH OF DARBY

Appeal from the United States District
Court For the Eastern District
of Pennsylvania
(D.C. Civil No. 89-00901)
District Judge: Honorable James T. Giles

Argued November 16, 1990

BEFORE: STAPLETON, HUTCHINSON and GARTH
Circuit Judges

(Opinion filed October 30, 1991)

MEMORANDUM OPINION OF THE COURT

STAPLETON, Circuit Judge

This appeal, like the appeals recently decided in Colburn v. Upper Darby Township and Simmons v. City of Philadelphia, involves a jail cell suicide. The mother of Octavis Long brought suit under 42 U.S.C. §1983 alleging that Darby Borough, its Chief of Police and certain members of its police department violated her son's constitutional rights. Long hanged himself while being held on summary charges until his mother could come to pick him up. The district court granted summary judgment in favor of all defendants. Mrs. Long appeals only as to the judgments granted in favor of the Borough and its Police Chief.

We have jurisdiction over this appeal from a final order of the district court pursuant to 28 U.S.C. §1291. We are

reviewing a grant of summary judgment. Accordingly, we have plenary review. See Goodman v. Mead Johnson & Co., 534 F.2d 566, 573 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977). We will affirm the judgment of the district court.

I.

On September 8, 1988, shortly before 1:00 A.M., Darby police responded to a report of a possible rape in progress. When they arrived at the scene, they found Octavis Long involved in a fight with his girlfriend. Long appeared intoxicated and was belligerent. He was arrested and cited for underage drinking, criminal trespass and disorderly conduct. The police handcuffed Long and brought him to the police station.

At the time of his arrest, Long was just shy of eighteen years old. When he continued to be loud and uncooperative, he was placed in the juvenile holding cell. The Darby police station has three cells. One is separated from the other two and is designated the juvenile cell. Long was placed in the cell shortly after 1:00 A.M. and was checked on seven regular half-hour checks plus checks when he called out or made noise. Officer Collins, one of the arresting officers, honed Long's mother at 1:30 A.M., informed her that her son had been arrested, and asked her to come to the police station to pick him up. Mrs. Long told the officer that she would not come that night. She asked the officer to call her in the morning, at the end of his shift, to wake her up so that she could pick Long up at 7:00 a.m.

At approximately 2:45 a.m., Officer Collins heard Long crying and went back to the cell block to check on him. Collins spent five minutes with Long. He explained to Long that his mother would be there in the morning to come pick him up. He suggested that Long get some sleep. Long became calm and Collins left the cell and the station at 2:50 a.m. believing that Long was all right.

After Collins left, the turnkey on duty, Bill Sweeney, was the only person left in the station with the detainees. At 2:59 a.m., Sweeney went back to the cell block to make his half-hourly check on the detainees. Sweeney found Long hanging by a pair of pants tied around the bars of his cell. Pursuant to department policy, Sweeney immediately went to the front of the station to radio for police officers to return to the station.

Turnkeys are untrained civilians and Darby police department policy forbids them from opening and entering jail cells unless ordered to do so by a police officer. Thus, in compliance with department policy, Sweeney did not open the cell until officers appeared at the station in response to his call. At some point before their arrival, whether before or after his call for help is unclear, Sweeney cut Long down without entering the cell.

Darby coves an area of only eight-tenths of a square mile and patrolling officers are constantly within close proximity of the jail. According to the only testimony on the point, emergency calls from turnkeys to patrol cars to return to the jail normally produce help within 30 seconds to a minute and a half. Police officers in two different patrol cars arrived on this occasion between

thirty seconds and two minutes after Sweeney called for help. One of the officers testified they arrived simultaneously in thirty seconds; Sweeney said it was about two minutes. The responding offices immediately began CPR. Paramedics arrived shortly thereafter and made additional efforts to resuscitate Long. Those efforts were unsuccessful and Long was declared dead later that evening. Plaintiff's expert is of the opinion that immediate resuscitation measures in all likelihood would have saved Long's life and left him with only minimal neurological deficits.

There is neither evidence nor allegation that the police or anyone else associated with the Borough had knowledge about Long's background that would give reason to believe he was suicidal. Rather, Plaintiff relies on expert evidence that

Long partially fit the profile of a high suicide risk in that he was young, incarcerated for a non-serious offense, confined with no cell mate and intoxicated. In addition, plaintiff presented expert testimony that a juvenile taken into custody should be transferred to a juvenile detention facility as soon as possible and should be kept under constant "eye-ball-to-eyeball" surveillance until such a transfer can be effected. Finally, Plaintiff urges that the policy of prohibiting the turnkey from entering a cell other than at the command of a police officer reflects deliberate indifference on the part of the Borough.

II.

It is now well settled in this circuit that there can be no §1983 liability on the part of a custodian or a

municipality in a jail suicide case in the absence of (1) a finding of deliberate indifference on the part of the custodian or some other municipal employee to whether suicidal detainees succeed in taking their lives and (2) a finding that such deliberate indifference was a proximate cause of the particular detainee's death. Colburn v. Upper Darby Township, ___ F.2d __. We conclude that a reasonable trier of fact could not make such findings on this record and will affirm the judgment of the district court.

There are many contexts in which a trier of fact might find deliberate indifference from a policy that failed to provide an attendant who could enter a cell in relative safety as soon as a suicide attempt is discovered to give first aid. Nevertheless, we think a finding of deliberate indifference would not be

permissible in this context. First, it must be acknowledged that entering a cell without the strength and training necessary to secure a detainee in the event the suicide attempt is a ruse is dangerous not only to the person entering the cell but also to the security of the prison. Given that hazard, we do not think the restriction on untrained turnkeys entering cells can itself be a predicate for a finding of reckless indifference to the lives of detainees. We reach the same conclusion with respect to the failure to keep a police officer trained in CPR and first aid continuously on the premises in light of the very limited size of the Borough and the evidence that trained officers were continuously available in under two minutes.

Nor do we believe that Plaintiff's evidence about the desirability of transferring minors to juvenile detention centers would adequately support a plaintiff's verdict in a case where the detainee is arrested and booked after 1:00 a.m., a parent is called to take immediate custody, and the parent declines but offers to pick the juvenile up at his present location at 7:00 a.m. The record indicates that under a least one accepted view, it is appropriate to retain custody of a juvenile on a temporary basis, but that he or she should be placed in a lockup only when it is necessary for the juvenile's protection and then only for a maximum of four hours.[1] Here Long's belligerent behavior required his being placed in a cell and while his

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[1] This is the view of the Director of Pennsylvania's Attorney General's Youth Project cited by one of plaintiff's experts, 278-279a.

anticipated stay was to be somewhat longer than four hours, the disparity will clearly not support an inference of deliberate indifference under the facts of this case.

Finally, the issue remains as to whether a jury could find deliberate indifference because Long's custodians did not keep him under eyeball-to-eyeball surveillance, despite the fact that he was young, intoxicated and confined for a non-serious offense in a cell by himself. Plaintiff's expert pointed out that "while the normal supervision of adult inmates requires that they be checked at thirty-minute intervals, this is not true with respect to juveniles who, when housed in adult facilities, '...are treated as far as an observation standpoint, very similar to someone who is an adult and who is suicidal.'" Appellant's Br., P. 23. He indicated that this was based on the fact

that the suicide rate for juveniles in adult jails was approximately eight (8) times greater than for juveniles out in the community and four times greater than the suicide rate of the general population. In absolute terms, "twelve juveniles will commit suicide for every 100,000 placed in adult jails", a probability of .00012. 275a.

There is no evidence that any custodian, police officer, or policy setter in the Borough was aware of the degree of suicide risk for juveniles detained in adult facilities testified to by plaintiff's expert. While that expert testified that the increased risk of suicide with juveniles confined in adult facilities was generally accepted knowledge in his field and should have been known to Borough

personnel, liability here requires more than a showing of negligence.[2] Given the

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[2] In Simmons, we upheld a jury verdict against the City of Philadelphia in a prison suicide case. However, nothing in Simmons suggests a city can be held liable in a municpal policy or failure-to-train case in the absence of evidence that an official or officials, found authorized by the applicable state or local law to establish a relevant policy or training program, had a state of mind characterized by deliberate indiffernece as to whether suicides do or do not occur in the city's jails. As is evident from the opinions of Judge Becker and Judge Sloviter in Simmons, the record there contained evidence from which a finder of fact could find that the relevant policy makers for the City (1) knew that 20 jail suicides had occurred in their jurisdiction between 1980-85, of whom 15 were intoxicated, (2) knew before 1981 that intoxicated detainees presented a high risk of suicide, (3) were aware of published standards for suicideprevention, (4) had considered making changes in the City's jail visual surveillance of intoxicated detainees, (5) had recieved recommendations for such changes of these kinds from experts, including the City's director of mental health services for the prison system, and (6) had failed to implement those recommendations. Here, nothing in the record would support a conclusion that Chief Smythe or any other policy maker for the city shared the kind of culpability that the jury apparently found in Simmons on the part of the policymakers or the City of Philadelphia.

need to detain Long and place him in a restrictive environment because of his intoxication and belligerence, as well as the attentiveness shown to Long's welfare after he was placed in a cell, we conclude that the record would not support a finding of deliberate indifference.

The judgment of the district court will be affirmed.

TO THE CLERK:

Please file the foregoing Memorandum Opinion.

WALTER K. STAPLETON
Circuit Judge

Judge Garth does not agree with this characterization of Simmons.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LUCY M. LONG	:	CIVIL ACTION
	:	
vs.	:	No. 89-0901
	:	
OFFICER THOMAS COLLINS, et al.	:	
	:	

MEMORANDUM

GILES, J. May 18, 1990

A. Factual and Procedural Background

On September 8, 1988, at approximately 1:00 a.m., three officers from the Darby Borough Police Department responded to a call reporting a rape in progress. The officers found Octavis Long and a young woman, later identified as his girlfriend, engaged in an apparent argument. Long was intoxicated and was uncooperative toward the police officers. Long, seventeen-and-a-half years old, was arrested and charged with the summary offenses of disorderly conduct, criminal trespass and

public drunkenness. He was transported to the jail in the Darby Borough Police Department, where he was placed by himself, apart from adult prisoners, in a cell designated for juveniles.

At 1:30 a.m., Officer Thomas Collins made a phone call to Lucy Long, the detainee's mother. The officer asked Ms. Long to pick up her son. Plaintiff's Response to Motion, Deposition of Lucy Long. Ms. Long replied,

> No, I'm not coming to pick him up tonight. Leave him there. I'll pick him up in the morning, if that's all right.

Id.

At her deposition, Ms. Long explained that she had declined to pick up her son

> because he was having these encounters, and I figured if I would let him stay there overnight, it might teach him a lesson and that he would straighten

up as far as getting those citations. Id.

After speaking with Ms. Long, Officer Collins entered the cellblock and informed Long that "his mother would be there at 7:00[a.m.]."...sort of calmed down." Defendants' Motion for Summary Judgment, Exhibit I, Deposition of Officer Collins at 42. Officer Collins left Long in the custody of the turnkey, who was responsible for checking on the safety of detainees. The turnkey checked on Long every thirty minutes from 1:00 a.m. to 2:30 a.m., with two additional interim checks.

At 2:45 a.m., Officer Cory Kramer heard Long crying in his cell. Officer Kramer entered the cell block and spoke with Long. During his deposition, Officer Kramer stated:

> When I walked into the cell and asked him what was the matter, he told me he just wanted to go home. I told him we

were just going to hold on to him until morning and that we had contacted his mother and that she suggested that he stay there for the night...He asked me why he couldn't go home. Again, I explained it to him. At this point, he calmed down and he stopped sobbing. In my mind, I believed that I calmed the situation down, that I reassured him that he was going home in the morning and that he would be all right and he stopped crying...I asked him if he was okay...I said, "If you need anything else, call the turnkey and he'll call me back in and I'll come back and talk to you."

Defendants' Motion for Summary Judgment, Exhibit L, Deposition of Officer Kramer at 70-72.

Officer Kramer finished speaking with Long and left the area at 2:50 a.m. At 2:59 a.m., during his regular periodic check of the cellblock, the turnkey found Long hanging from his pants, which were tied around the bars of the cell. In accordance with the Borough's policy, the turnkey did not enter the cell, but sent an emergency radio message to the officers on duty. Under the procedures in place, it

was expected that the officers receiving such calls would be able to return to the police station within 30 seconds to a minute and a half. Plaintiff's Response, Exhibit 6, Deposition of Brian Bradway at 6. On this occasion, the officers arrived at the police station within 30 seconds. Id. at Exhibit 7, Deposition of Officer Kramer at 76. Officer Kramer, who was certified to perform CPR, performed CPR on Long, and an ambulance was summoned. The efforts to revive Long failed, and he died shortly thereafter.

The decedent's mother sued the custodial officers, the chief of police, the mayor, the Borough of Darby, and the

Borough of Darby Police Department under 42 U.S.C. §1983.[3] She alleged that the defendants were recklessly indifferent in failing to prevent her son's suicide. She also asserted a claim charging excessive force during the arrest and a claim under 42 U.S.C. §1981. Defendants moved for summary judgment. Plaintiff responded, and oral argument was held on May 14, 1990. At oral argument, plaintiff stated that she was pressing claims only against the Borough of Darby; the mayor, Louis Sauraullo, in his official capacity; and

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[3] Although section 1983 does not explicitly provide for survivor actions, 42 U.S.C. §1988 has been interpreted as allowing for such actions when claims are pressed under section 1983. See Jones v. McElroy, 429 F.Supp. 848, 851-2 (E.D. Pa. 1977). Under section 1988, the method of recovery is determined accoridng to the state survival statute. Accordingly, plaintiff seeks recovery for the alleged civil rights violations under the Pennsylvania Wrongful Death and Survival Act, 42 Pa. Cons. Stat. §8301, et seq. However, plaintiff has brought no claims under state law.

the chief of police, Robert Smythe, both in his individual and official capacities. For the reasons discussed below, the motion for summary judgment is granted.

B. Discussion

1. The Reckless Indifference Standard

In Hudson v. Palmer, 468 U.S. 526-7 (1984), the Supreme Court stated that prison administrators "are under an obligation to take reasonable measures to guarantee the safety of the inmates themselves." In Colburn v. Upper Darby Township, 838 F.2d 664, 668 (3d Cir. 1988), cert. denied, 109 S. Ct. 1338 (1989), the third circuit announced that the same duty was owed to detainees, and that the duty applied "when the acts causing the injury are those of the prisoner herself." The third circuit explained that:

> [C]ustodial officials cannot be placed in the position of guaranteeing that inmates will not commit suicide. On the other hand, if such officials know or should know of the particular vulnerability to suicide of an inmate, then the Fourteenth Amendment imposes on them an obligation not to act with reckless indifference to that vulnerability.

Id. at 669.

In Colburn, the third circuit declined to "define 'gross negligence' or distinguish it from 'reckless disregard' or 'reckless indifference' in the civil rights context." Id. at 670. Neither has the court distinguished the term "deliberate indifference." Williams v. Borough of West Chester, 891 F.2d 458, 464 n.10 (3d Cir. 1989). Consequently, an understanding of "reckless indifference" or "deliberate indifference" must be derived from the third circuit's fact-specific holdings in cases involving detainee suicides.

In Colburn, the first of these cases, a detainee committed suicide by shooting herself, and her estate sued the custodial officer, among others. The custodial officer moved to dismiss. The district court granted th emotion, and the third circuit reversed. The third circuit held that the facts that were alleged or could have been alleged gave rise to a claim for reckless indifference. Id. at 670. These alleged facts were as follows: on the day before she was taken into custody, the decedent had jumped from a window and the police had been summoned; the decedent had "obvious scars" on her right wrist from a previous suicide attempt; the custodial officer, upon searching the decedent, found a round of live ammunition in the decedent's pocket, but not the gun with which the decedent

later killed herself; and the custodial officer had to prevent the decedent from swallowing valium pills. Id.

In Freedman v. City of Allentown, 853 F.2d 1111 (3d Cir. 1988), a detainee committed suicide by hanging himself, and his estate sued the custodial officers. The officers moved to dismiss. The district court granted the motion, and the third circuit affirmed. Plaintiff alleged that the decedent had shown one of the officers "large prominent scars" on his wrists and neck, which the forensic pathologist later described as "suicide hesitation cuts." Id. at 1113. Plaintiff alleged that, after the officer viewed the scars, the decedent was placed in a remote cell where he could not be readily observed. Id. The third circuit held that the officer's alleged failure to recognize the scars as attempted suicide marks amounted to negligence, at

most, and could not support a claim for deliberate indifference. Id. at 1116. The court held that since the officers did not recognize the detainee's suicidal propensity, they were not deliberately indifferent by failing to provide close surveillance of the detainee. Id.

In Williams v. Borough of West Chester, 891 F.2d 458 (3d Cir. 1989), a detainee committed suicide by hanging himself with his belt. His estate sued the custodial officers and the Borough of West Chester. Upon motion, the district court entered summary judgment for all defendants, and the third circuit affirmed. The evidence showed that the decedent had a long history of suicide attempts and mental illness, and that this history was known to many members of the Borough's police department. Id. at 461. When the decedent was arrested and held in a police cell, the

custodial officers neglected to remove his belt. Upon being placed in the cell, the decedent was heard banging on the cell block door and yelling. Several minutes later, the custodial officers left the police station for at least twenty-five minutes. During this time, the only police department employee in the station was a dispatcher who had no custodial responsibility for prisoners. The dispatcher heard the decedent yelling but did not check the cell. When a custodial officer returned to the police station, he found the decedent dead, hanging from the ceiling by his belt. Id. at 462.

The third circuit held that the behavior of the custodial officers did not amount to reckless indifference. The court reasoned that "there is no direct evidence that [the officers] actually knew of [decedent's] suicidal propensity," and the

circumstantial evidence was insufficient to warrant an inference that they knew. Id. at 465, 466. In the absence of such knowledge, the court found, failing to remove the detainee's belt and leaving him unsupervised for twenty-five minutes amounted to negligence, at most.

2. Application of the Third Circuit Precedents

Here, in contrast with any of the third circuit opinions, there is no evidence or allegation that Long, the decedent, had a suicidal propensity. In their depositions, Long's mother, brother, and nephew all testified that he had never threatened suicide or exhibited suicidal tendencies. Defendants' Motion for Summary Judgment, Exhibit Q. There is no evidence that Long threatened to commit suicide while being held in the Darby Borough jail.

The absence of evidence regarding suicidal propensity is crucial to the disposition of defendants' motion. Under 42 U.S.C. §1983, municipalities and supervisory municipal officials in their official capacities may be liable for federal constitutional violations only if the alleged violations are shown to have occurred pursuant to an official policy or custom. Monell v. Dept. of Social Services of the City of New York, 436 U.S. 658 (1978); Colburn v. Upper Darby Township, 838 F.2d 663 (3d Cir. 1988). Here, plaintiff argues that the Borough's policy regarding supervision of detainees is unconstitutional. Specifically, plaintiff contends that instructing turnkeys to radio for help, rather than having them enter the cells, amounted to deliberate indifference to the needs of Long.

Because Long did not demonstrate a suicidal propensity, the policy of having turnkeys radio for help did not amount to deliberate indifference. In Williams, the custodial officers neglected to remove the detainee's belt, and left the detainee unsupervised (i.e., only a non-custodial employee was present) for at least twenty-five minutes. The third circuit found no deliberate indifference because the custodial officers did not know of the detainee's suicidal propensity. Here, where the detainee had never exhibited a suicidal propensity,[4] entrusting supervision to a custodial employee, who could,

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[4] Plaintiff argues that, because Long was a juvenile who was intoxicated, he fit the statistical profile of someone who was more likely to commit suicide. However, custodial officials are only required to respond to the "particular vulnerability to suicide of an inmate," Colburn, 838 F.2d at 669 (emphasis added). The failure to recognize or to act upon a statistical likelihood, without more, amounts to no more than negligence.

and did, summon medical help within 30 seconds, falls well short of culpable behavior under Williams.

Plaintiff also argues that the Borough maintained unconstitutional policies by 1) failing to train turnkeys adequately in suicide prevention and 2) failing to maintain constant supervision of juvenile detainees. Similar claims were rejected in Williams, 891 F.2d at 467 n.14, and the claims must be rejected here. As to the former argument, a deficient training policy can form the basis for municipal liability under 42 U.S.C. §1983, but only under special circumstances. The failure to train in a relevant respect must bear a close causal relation to the ultimate injury and amount to "deliberate indifference to the rights of persons with

whom the police come into contact." City of Canton v. Harris, 109 S. Ct. 1197, 1204 (1989).

Since Long had never displayed suicidal tendencies, the failure to train turnkeys adequately in suicide prevention would be negligent, at most. See Williams, 891 F.2d at 467 n.14. Moreover, at oral argument, plaintiff conceded that all of the previous suicide attempts in the Darby Borough jail had been thwarted. The Borough's success in preventing suicides prior to Long's suicide weakens the claim that the turnkeys were inadequately trained.

Similarly, where there is no sign of a suicidal propensity, the failure to provide constant supervision does not amount to deliberate indifference. In Williams, the third circuit declined to find deliberate indifference where a

detainee was left unchecked for at least twenty-five minutes. Here, Officer Kramer checked on Long and believed that he had calmed Long only nine minutes before Long committed suicide.[5]

Finally, Plaintiff argues that the Borough maintained an unconstitutional policy by detaining juveniles in adult facilities.[6] Plaintiff points to no authority for the proposition that

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[5] The fact that Long was a juvenile does not affect the analysis, for nothing in Colbur, Freedman, or Williams suggests that, regardless of suicidal propensity, juvenile detainees must always be placed under constant supervision. Moreover, there is no state statute or regulation which requires constant "eyeball" supervision of juvenile detainees arrested and awaiting release to parents. The statute to which plaintiff points, see 42 Pa. Cons. Stat. §6327, applies only to juveniles accused of being or adjudicated delinquent. The paties agree that the decedent did not fall within this category. Accordingly, the failure to provide constant supervision of Long was not violative of state law and was a permissible exercise of discretion.

[6] Long was kept in a separate cell, apart from adult prisoners.

detaining juveniles in an adult facility is unconstitutional per se or violative of a federal statute.[7] Even assuming that such a policy would be actionable under section 1983, there is no evidence that the Borough had such a policy. On the contrary, the evidence suggests that the Borough's policy entailed releasing juveniles to their parents, rather than detaining them. In 1981, the Borough's police superintendent stated in a letter to the Pennsylvania Attorney General that juveniles were not detained in adult facilities, but were "release[d]...to their parents as soon as possible." Plaintiff's Response, Exhibit 17. When Long was arrested, the custodial

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[7] The federal Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. §5633 (a) (14), makes funding for state delinquency programs contingent upon juveniles not being detained in adult facilities. However, there are a number of exceptions to this requirement. Plaintiff does not argue that this section applies and I need not decide whether it does.

officers immediately called his mother and sought to release him to his mother. The fact that the Borough detained Long overnight when his mother refused to pick him up does not demonstrate an unconstitutional policy, and amounts to negligence at most.

Since plaintiff has failed to show that the Borough's policies might be unconstitutional, summary judgment on the suicide prevention claims must be entered for the Borough of Darby; the mayor, Louis Sauraullo, in his official capacity; and the chief of police, Robert Smythe, in his official capacity.

3. Remaining Claims

Plaintiff charges that excessive force was used when Long was arrested, and also presses claims under the Fourth and Fifth Amendments. In addition, plaintiff

brings a claim under 42 U.S.C. §1981, a statute which is triggered only by intentional discrimination. See General Building Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375, 391 (1982). Defendants move for summary judgment on these claims, pointing to an absence of evidence. Plaintiff has neither advanced arguments nor pointed to evidence which could refute defendants' position. Accordingly, summary judgment must be entered for defendants on these claims.

Finally, the chief of police, Robert Smythe, was not present during the events preceding Long's suicide, and plaintiff has not pointed to any evidence of his personal involvement. Accordingly, summary judgment must be entered for Robert Smythe on the claim suing him in his individual capacity.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

LUCY M. LONG vs.	:	CIVIL ACTION
OFFICER THOMAS COLLINS, et al.	:	No. 89-0901

ORDER

AND NOW, this 18th day of May, 1990, in accordance with the foregoing memorandum, it is hereby ORDERED that defendants' motion for summary judgment is GRANTED as to all defendants.

BY THE COURT:

JAMES T. GILES
J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

LUCY M. LONG	:	CIVIL ACTION
	:	
vs.	:	
	:	No. 89-0901
OFFICER THOMAS COLLINS, et al.	:	

ORDER

AND NOW, this 21st day of May, 1990, it is hereby ORDERED that this court's memorandum of May 18, 1990, is MODIFIED as follows:

1. On page nine, the following footnote should appear after "30 seconds":

> According to plaintiff, the turnkey testified that the police did not arrive for two minutes. However, plaintiff has not attached this testimony, so plaintiff's assertion must be discounted. Even if such testimony were present, it would not give rise to a material factual dispute. In view of the undisputed facts, including the fact that the procedures in place were expected to produce the officers within 30 seconds to a minute and a half, see Plaintiff's

Response, Exhibit 6, Deposition of Brian Bradway at 6, the elapsing of two minutes before the police arrived would not amount to deliberate indifference under Williams.

BY THE COURT:

JAMES T. GILES
J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

LUCY M. LONG	:	CIVIL ACTION
vs.	:	
	:	No. 89-0901
OFFICER THOMAS COLLINS, et al.	:	

JUDGMENT ORDER

AND NOW, this 21st day of May, 1990, in accordance with this court's memorandum and order of May 13, 1990, it is hereby ORDERED that JUDGMENT is entered in favor of all defendants and against plaintiff Lucy M. Long.

BY THE COURT:

JAMES T. GILES

J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 90-1389 and 90-1408

LUCY M. LONG, Individually and as
Administratrix of the Estate of
OCTAVIS M. LONG, her son, deceased,

Appellant

v.

OFFICER THOMAS COLLINS,
OFFICER DARRELL GUY, OFFICER
CORY KRAEMER, OFFICER RICHARD
GALLI, CHIEF ROBERT SMYTHE,
DARBY BOROUGH POLICE DEPARTMENT
AND MAYOR LOUIS SAURAULLO, AND
THE BOROUGH OF DARBY

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, Chief Judge, BECKER,
STAPLETON, MANSMANN, GREENBERG,
HUTCHINSON, SCIRICA, COWEN,
NYGAARD, ALITO, ROTH, and GARTH,
Circuit Judges

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT:

WALTER K. STAPLETON
Circuit Judge

Dated: December 2, 1991

42 U.S.C. Section 1983 states:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

Amendment XIV of the United States Constitution states:

"Materials for the Due Process Clause of Section 1 are set out in this volume and the following volume. See preceding volume for materials pertaining to the Citizenship and Privileges and Immunities Clauses of that section and the volume containing the end of the Constitution for materials pertaining to the Equal Protection Clause of that section and Sections 2 to 5.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United State and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the Untied States; nor shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The congress shall have power to enforce, by appropriate legislation, the provisions of this article.